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IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

RALPH NADER, *et al.*,
Petitioners,

v.

ENVIRONMENTAL PROTECTION AGENCY,
et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Did the Ninth Circuit err in ruling that it had no jurisdiction to review the Environmental Protection Agency's denial of a citizens' petition to ban a pesticide, where the applicable jurisdictional provisions require circuit court review of final agency orders, and where this Court held in *Florida Power & Light Co. v. Lorion*, 470 U.S. 729 (1985), that a similar statute required circuit court review of an agency's denial of a similar petition?

PARTIES TO THIS PROCEEDING

Petitioners Ralph Nader, Public Citizen, Natural Resources Defense Council, American Academy of Pediatrics, Noah D. Beyeler, Naomi S. Beyeler, Mark Beyeler and Dr. Philip J. Landrigan were the petitioners in the court of appeals. In addition, the State of New York was a petitioner in the court below.

Respondents Environmental Protection Agency and Uniroyal Chemical Company were the respondents in the court below.

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OPINION BELOW

The opinion of the court of appeals is reported at 859 F.2d 747 and is printed in the separately bound appendix (Pet. App. 1-19). The decision of the Environmental Protection Agency denying the petition to ban the use of Alar (Pet. App. 46-65) is not reported.

JURISDICTION

The judgment and opinion of the court of appeals (Pet. App. 1-19) were entered on October 14, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Sections 408(d), (e), (i) & (*l*) and sections 409(c)-(h) of the Federal Food, Drug and Cosmetic Act, 21 U.S.C. §§ 346a(d), (e), (i) & (*l*), and 348(c)-(h), are reprinted at Pet. App. 74-86.

STATEMENT

Petitioners sought review in the court of appeals of a decision by the respondent Environmental Protection Agency ("EPA") denying their petition to revoke the authority to use the pesticide Alar in food. Alar, which is the brand name given by respondent Uniroyal Chemical Company ("Uniroyal") to the chemical daminozide, is applied to apples and other foods to give them a deeper, brighter color and to promote uniform ripening. The petition relied on EPA's own findings that Alar is both an animal carcinogen and a probable human carcinogen. However, without reaching the merits of petitioners' claims, the court of appeals dismissed the case for lack of jurisdiction.

1. Statutory Framework

Pesticides used on food are subject to the standards of the Pesticide Amendments to the Federal Food, Drug, and Cosmetic Act ("FDC Act"), 21 U.S.C. § 346a. First enacted in 1938, these amendments establish a system of tolerances by which EPA prescribes the residue of pesticides permitted on food, which must be consistent with "protect[ion of] the public health." 21 U.S.C. § 346a(b). Thus, for example, the current residue allowed for Alar on apples is 20 parts per million ("ppm"), which means that any apples containing residues that exceed the tolerance are unsafe, adulterated, and illegal. 21 U.S.C. §§ 331(a), 342(a)(2), 346a.[1]

[1]Pesticides are also subject to the less stringent standards of the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. § 136a, but that statute is not at issue in this case.

In addition, pesticides found in processed foods may be "food additives," which are subject to the requirements of the Food Additives Amendment to the FDC Act, 21 U.S.C. § 348. That amendment applies where the manufacturer has requested a higher tolerance in a processed food than EPA permits in the raw product, which may be necessary if the pesticide concentrates during processing. *See* 21 U.S.C. §§ 321(s), 342(a)(2)(C). EPA's current tolerance for Alar in concentrated tomatoes falls into this category. 52 Fed. Reg. 27,542-43, 27,551-52 (July 22, 1987).

A provision of the Food Additives Amendment, the Delaney clause, 21 U.S.C. § 348(c)(3)(A), prohibits approval of any food additive that is an animal carcinogen, including pesticides that concentrate in processed foods at levels that are higher than the tolerance for raw foods. *See Public Citizen v. Young*, 831 F.2d 1108 (D.C. Cir. 1987), *cert. denied*, 108 S.Ct. 1470 (1988). Therefore, if EPA had accepted petitioners' argument that Alar is an animal carcinogen, it would have been required to revoke its regulations permitting higher residues of Alar in processed foods than are permitted in the raw products.

2. Administrative Proceedings

In a series of findings issued since 1977, EPA officials have recognized that Alar is a carcinogen and that its use on food products entails a potentially serious risk for humans. These findings were based on five scientific studies conducted on daminozide (the chemical name for Alar) and unsymmetrical dimethylhydrazine ("UDMH"), a chemical component of Alar. Pet. App. 6-8, 27-33.

Based on these studies, in 1984 EPA initiated a Special Review to consider whether to ban Alar. 49 Fed. Reg. 29,136 (July 18, 1984). Normally, after reviewing the comments submitted in response to such an announcement, EPA would go through a

two-stage process before issuing a final regulation. *See id.* at 29,137. However, the evidence of Alar's risk was so compelling that EPA consolidated these two stages for the only time in its history, and on September 12, 1985, it issued a draft final regulation that it circulated to the public. *See* Pet. App. 7-8.

In this draft rule, EPA calculated the risk of Alar to individual consumers. On the basis of the studies on daminozide and UDMH, it concluded that the cancer risk caused by Alar residues in foods may be as high as between 1/100 and 1/1,000 for adults, and that the risk may be significantly higher for children. Pet. App. 7-8. While the actual human risk will not necessarily be as high as these calculations indicate, they did demonstrate that the use of Alar entails a serious human health risk that the agency was required to address.

In accordance with its procedures, EPA referred the issue to its outside Scientific Advisory Panel, which held a one-day hearing on September 26, 1985. One week later, the panel issued a three-page report concluding that there was insufficient data to make a reliable assessment of the risk posed by Alar. *See* Pet. App. 8. EPA then reversed its course and announced that it proposed to permit the continued use of Alar pending the submission of new studies on both daminozide and UDMH, but that in the interim it would reduce the Alar tolerance for apples from 30 ppm to 20 ppm. Pet. App. 8-9; 51 Fed. Reg. 12,889 (April 16, 1986).

On July 1, 1986, five of the petitioners submitted a 27-page petition to EPA, requesting that the tolerance for Alar be revoked on the ground that Uniroyal could not sustain its burden of proving Alar's safety, as required by the FDC Act. Pet. App. 20-45. If it had granted the petition, EPA would then have initiated proceedings to revoke its regulation, after providing Uniroyal the opportunity to obtain a hearing. *See* 21 U.S.C. §§ 346a(d)(5), 346a(e).

On January 6, 1987, EPA issued a 14-page response, denying the petition. Pet. App. 46-65. Without addressing the issue of whether Uniroyal had carried its burden of demonstrating that Alar is safe, EPA argued that it had independent authority to leave Alar on the market pending further studies because "the available data are not adequate to enable the Agency to determine whether the long-term presence of daminozide residues in food poses a health hazard to the U.S. consumer." Pet. App. 46-47.

On January 16, 1987, in a separate proceeding, EPA issued a final rule lowering the Alar tolerance applicable to apples to 20 ppm because of its concern about the health effects of the pesticide, 52 Fed. Reg. 1909, and in July of that same year, the agency extended the 20 ppm tolerance to January 31, 1989. 52 Fed. Reg. 28,256 (July 29, 1987).[2]

3. The Court of Appeals' Decision

Petitioners are five individual consumers of products containing Alar, two public interest organizations, and the American Academy of Pediatrics. They sought review of the agency's denial of their petition in the United States Court of Appeals for the Ninth Circuit, alleging jurisdiction under 21 U.S.C. §§ 346a(i) and 348(g). EPA was named as the respondent, and Uniroyal was permitted to intervene as a respondent.

In their briefs below, both respondents argued that the court of appeals did not have jurisdiction. EPA's principal argument was that petitioners were, in effect, appealing from the agency's

[2]On July 22, 1987, EPA revoked several Alar tolerances for processed foods. 52 Fed. Reg. 27,542-43, 27,551-52. However, the tolerance for processed tomatoes (3 ppm) is still six times greater than the tolerance for raw tomatoes (.5 ppm). *Id.* In addition, EPA has now received the results of the studies that it required on daminozide, but it has not issued any interpretation of those results. Petitioners anticipate that EPA will extend the Alar tolerances this month. *See* 53 Fed. Reg. 41,238 (October 20, 1988).

January 16, 1987 regulation, rather than from the denial of their petition, although petitioners had stated explicitly in their opening brief that they were appealing from the January 6th denial of their petition. On the basis of this erroneous assumption, the agency argued that the Pesticide Amendments, 21 U.S.C. § 346a, required petitioners to file objections and to participate in an administrative hearing before seeking review in the court of appeals, although EPA acknowledged that the D.C. Circuit had recently rejected this same argument in *National Coalition Against the Misuse of Pesticides v. Thomas*, 809 F.2d 875 (1987). In a footnote, EPA stated, without elaboration, that the court of appeals would not have jurisdiction to review the denial of a citizens' petition under section 346a. The agency also argued that the jurisdictional provision in the Food Additives Amendment, 21 U.S.C. § 348, required petitioners to file objections with the agency prior to seeking review in the court of appeals.[3]

Uniroyal also contended that the court of appeals did not have jurisdiction, but it stated that petitioners could have obtained judicial review in the district court. Neither respondent attempted to reconcile its position with this Court's decision in *Florida Power & Light Co. v. Lorion*, 470 U.S. 729 (1985), which held that only the courts of appeals had jurisdiction to review a denial of a citizens' petition under an analogous statute.

The Ninth Circuit agreed that it lacked jurisdiction. As to the Pesticide Amendments, 21 U.S.C. § 346a, the court's critical finding was that the denial of the petition was not an "order"

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[3]Section 346a is directed to the Administrator of EPA, and section 348 is directed to the Secretary of the Department of Health and Human Services, who has the principal responsibility for regulating food additives. However, in 1970, the Administrator of EPA was given jurisdiction to set tolerances for all uses of pesticides, including those uses that are regulated as food additives under section 348. Reorg. Plan No. 3 of 1970, § 2(4), *reprinted at* 5 U.S.C.A. App. at 82.

within the meaning of section 346a(i), the provision of the statute granting circuit court jurisdiction. According to the court, since EPA had not issued an "order," section 346a(i) did not apply. Although Uniroyal had contended that the district court would have jurisdiction over petitioners' claim, the court did not indicate whether review could be obtained there, and its opinion can be read as holding that no court has jurisdiction to review EPA's final denial of a citizens' petition filed under the Pesticide Amendments. Pet. App. 12-19.

As to the claim regarding processed foods under the Food Additives Amendment, 21 U.S.C. § 348, the court held that it would have jurisdiction to review EPA's denial of a petition only after the agency had ruled on objections filed under section 348(f). Since petitioners had not filed objections, and since the time for filing such objections had expired, the court held that section 348 also could not provide a basis for jurisdiction. Pet. App. 11-12.

Implicitly recognizing that its result was rather harsh, the court attempted to blame petitioners for the jurisdictional defect that it had identified. Thus, it pointed out that 10 days after denying the petition, EPA had issued a final regulation lowering the tolerance for Alar in raw apples from 30 ppm to 20 ppm. Pet. App. 15-16. The court then stated that petitioners could have obtained judicial review of that regulation in the court of appeals (*id.*), even though the proposed regulation had not identified a ban on Alar as an option that was under consideration, and even though the regulation applied to only one of the agency's approximately two dozen Alar tolerances. 51 Fed. Reg. 12,889 (April 16, 1986).

REASONS FOR GRANTING THE PETITION

In *Florida Power & Light Co. v. Lorion*, 470 U.S. 729 (1985), this Court held that judicial review of the denial of a citizens' petition to the Nuclear Regulatory Commission ("NRC") must be brought in the court of appeals rather than in the district court. In explaining its decision, the Court emphasized that the interests of judicial economy and orderly judicial review support a rule that provides for initial jurisdiction in an appellate court. *Id.* at 742-43.

Nevertheless, the court below reached the opposite result in interpreting similar language in sections 346a(i) and 348(g) of the FDC Act. In section 1, we demonstrate that the Ninth Circuit's decision is inconsistent with the jurisdictional provisions of the FDC Act, particularly when they are construed in light of *Florida Power*. In section 2, we show that the Ninth Circuit's decision seriously departs from other decisions of the circuit courts which, after *Florida Power*, have consistently interpreted similar jurisdictional statutes to require unified review of all issues in the same forum that is designated to review the underlying order or regulation, here the courts of appeals, and that the decision below leads to confusing and inconsistent rules with respect to judicial review under the FDC Act. Finally, in section 3, we demonstrate that none of the justifications relied on by the Ninth Circuit for its decision can withstand scrutiny, particularly in light of the principles that this Court enunciated in *Florida Power*.

As explained more fully below, review is necessary in order to eliminate the confusion among the lower courts as to how to apply *Florida Power* to other statutes and particularly to statutes such as the FDC Act which provide for objections and hearing requests. Because this case involves the interpretation of two

independent jurisdictional provisions of the FDC Act, it provides an especially appropriate vehicle to resolve the confusion in, and conflict among, the circuits.

1. The Court of Appeals Erred in Construing the Jurisdictional Provisions of the FDC Act and Seriously Departed From the Teachings of *Florida Power*.

a. *Section 346a.* Section 346a(i), the jurisdictional provision of the Pesticide Amendments, relied on by petitioners for the claim that they made under section 346a, permits "any person who will be adversely affected" to obtain review in one of the circuit courts of appeals from any "order" issued under one of three subsections in the Act — (d)(5), (e) or (*l*). 21 U.S.C. § 346a(i). Because subsections (d) and (*l*) pertain to applications for permission to use pesticides on foods, those provisions are not at issue in this case. Instead, the petition to EPA was filed under subsection (e), which provides that the Administrator may "on his own initiative or upon the request of any interested person" propose regulations pertaining to pesticide tolerances. Thirty days after issuing the "proposal," he may, by "order," issue such a regulation. Based on its narrow reading of the term "order," the Ninth Circuit concluded that there was no jurisdiction in the court of appeals to review final decisions rejecting citizens' petitions. In so ruling, it adopted the very approach to statutory construction that was rejected by this Court in *Florida Power*.

The statute at issue in *Florida Power*, the Hobbs Act (28 U.S.C. § 2342(4)), provides for circuit court review of "final orders" issued by the NRC under 42 U.S.C. § 2239. Section 2239 provides that the NRC may issue a "final order" in a "proceeding . . . for granting, suspending [or] revoking" a license. 42 U.S.C. § 2239(a), (b). Because the NRC had decided not to initiate a "proceeding" to consider revoking the license of a nuclear power

plant, the court of appeals held that only the district court had jurisdiction to review the agency's denial of the petition.

In reversing the lower court, this Court never suggested that the NRC's denial of the petition might not be an "order" within the meaning of section 2239, nor was such an interpretation urged by the Solicitor General. Instead, the court of appeals' ruling turned on whether the petition had been denied in a "proceeding," as required by section 2239. Although acknowledging that the reference to a proceeding was "problematic" (because the NRC had never initiated one), and that the statutory language could have supported the court of appeals' decision, this Court liberally construed the jurisdictional provision to allow review of the denial of citizens' petitions by the courts of appeals, rather than the district courts. 470 U.S. at 736.

Here the statutory language even more strongly supports jurisdiction in the court of appeals than it did in *Florida Power* because there is no apparent link between the term "order" and any proceeding. Instead, section 346a(i) allows appellate review of any "order" entered pursuant to section 346a(e). The court of appeals seized on subsection (e)'s reference to an "order" entered after the publication of a proposal to issue a tolerance, and held that the review provision covered only such orders. In the court's view, since EPA had denied the petition without publishing it as a proposal, there was no section 346a(e) order for petitioners to appeal. Nothing in the statute, however, suggests that publication of a petition (which would be the first step toward granting it) is the only type of order that EPA may issue under section 346a(e).

The panel's interpretation of the term "order" in section 346a(i) is also refuted by its own interpretation of that term in section 348(g), the other jurisdictional provision involved in this

case. Thus, while holding that EPA's denial of the petition was not an order for purposes of section 346a(i), it held that the same decision was an order for purposes of section 348(g). Pet. App. 11-12. Both rulings cannot be correct, and *Florida Power* strongly suggests that the court below erred regarding section 346a(i).

b. *Section 348*. Unlike section 346a, the Food Additives Amendment, 21 U.S.C. § 348, contains no provision for petitions by "interested persons." Instead, it provides only for review of regulations issued on the basis of a petition to approve a food additive (section 348(c)) or on the Administrator's initiative (section 348(d)), after the agency has ruled on objections. 21 U.S.C. § 348(g). Based on the language of the statute, prior to *Florida Power*, appeals from denials of citizens' petitions would have been filed in the district court, pursuant to the Administrative Procedure Act, 5 U.S.C. § 702, and 28 U.S.C. § 1331. Since *Florida Power*, the FDA has, correctly in our view, taken the position that under section 348 the court of appeals has exclusive jurisdiction to review all denials of citizens' petitions requesting changes in food additive regulations. *See* Pet. App. 66-73 (FDA's brief in *Public Citizen v. Bowen*, 833 F.2d 364 (D.C. Cir. 1987)). In contrast to the arguments that EPA made in this case, which were accepted by the Ninth Circuit, neither the FDA nor any other court has ever suggested that objections must be filed prior to seeking appellate review of petitions filed under section 348. Since the FDA is the agency with principal responsibility for administering the Food Additives Amendment, its construction is entitled to considerable deference.

Although it is the first court ever to require that petitioners file objections before seeking review of the denial of a citizens' petition under section 348, the court below did not reconcile its decision with the purposes of the objection provision or *Florida*

Power. The objection procedure requires interested parties, including those who did not participate in the initial proceeding, to notify the agency and the pesticide manufacturer of the basis of any objections, and thus to give the agency an opportunity to correct any errors prior to judicial review. However, in the case of a citizens' petition, that function is served by the petition itself, and the objection procedure would simply require the petitioner to restate its arguments, resulting in an unjustified delay in resolving a petition raising important public health issues. To require petitioners to engage in such a futile exercise is contrary to both the purposes of the objection provision and *Florida Power*, but that is what the Ninth Circuit held.[4]

2. The Decision Below Is Contrary to Both Principles of Sound Judicial Administration and Settled Case Law, and It Increases the Existing Confusion Regarding Jurisdiction Under the FDC Act.

Until the decision below, the federal appellate courts, including the Ninth Circuit, had generally interpreted *Florida Power* to require unified review in the court of appeals under a wide variety of administrative statutes. *Commonwealth Edison Co. v. Nuclear Regulatory Commission*, 830 F.2d 610, 612-13 (7th Cir. 1987) (circuit court review of challenge to fees imposed by NRC in connection with license application because statute provides for circuit court review of operating license); *Vineland Chemical Co. v. Environmental Protection Agency*, 810 F.2d 402, 405-06 (3d Cir. 1987) (circuit court review of termination of interim status under Resource Conservation and Recovery Act because statute provides for circuit court review of final permit decision); *Tennessee v. Herrington*, 806 F.2d 642, 649-51 (6th Cir. 1986),

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[4]The court of appeals appeared to assume that filing objections would require EPA to hold a hearing (Pet. App. 11-12, 16), but in fact EPA has never held an administrative hearing under either section 346a or section 348. 53 Fed. Reg. 41,126, 41,127 (October 19, 1988).

cert. denied, 107 S.Ct. 1604 (1987) (statutory ambiguity regarding appropriate forum for judicial review of issue arising under Nuclear Waste Policy Act resolved in favor of review in the circuit court); *Modine Manufacturing Corp. v. Kay*, 791 F.2d 267, 269-71 (3d Cir. 1986) (circuit court review of individual application of standards under Clean Water Act because statute provides for circuit court review of underlying standard); *Public Utility Commissioner v. Bonneville Power Administration*, 767 F.2d 622, 627-28 (9th Cir. 1985) (circuit court review of constitutional challenge to ongoing agency proceeding under Pacific Northwest Electric Power Planning and Conservation Act because statute provides for circuit court review of such challenges to final actions); *see also Telecommunications Research and Action Center v. Federal Communications Commission*, 750 F.2d 70, 74-79 (D.C. Cir. 1984). As then-Judge Kennedy concluded in *Public Utility Commissioner, supra, Florida Power* indicates a "strong preference for reviewing all preliminary or ancillary issues in a proceeding in the forum provided for the final agency action or order." 767 F.2d at 627. *But see Public Citizen v. Bowen, supra*, 833 F.2d at 366 n.1 (dicta), discussed *infra* at page 15.

Nevertheless, as a hypothetical taken from the facts of this case demonstrates, the decision below creates precisely the confusion and inefficiency that the Court in *Florida Power* sought to avoid. Thus, only ten days after EPA denied the petition, it issued a regulation pursuant to section 346a(e), lowering the tolerance for Alar on apples from 30 ppm to 20 ppm. It is clear that if Uniroyal had contested that decision, jurisdiction over such a challenge would have been in the court of appeals. 21 U.S.C. §§ 346a(c), 346a(i). However, under the Ninth Circuit's decision, any judicial review of EPA's denial of the portion of the citizens' petition that requested a ban on all uses of Alar under section 346a would be in the district court.

Moreover, to obtain review of their narrower request under the Food Additives Amendment, 21 U.S.C. § 348, petitioners would have had to file objections, participate in a hearing, wait for EPA to reach a decision, and then petition for review in the court of appeals. Such bifurcation of review of the denial of a single petition to a single agency to ban a single pesticide, both in terms of timing and forum, is wholly inconsistent with the policy favoring unified judicial review that the Court endorsed in *Florida Power*.[5]

On the other hand, it is possible that the Ninth Circuit intended to rule that petitioners had no right to judicial review of the denial of their petition and that they could obtain review of the Alar regulation only by seeking review within 60 days after it was promulgated, which was in 1968 (Pet. App. 6), or after it was amended, a matter that is wholly within the discretion of the EPA. Such a result would lead to less confusion, but it would be flatly inconsistent with well-embedded case law, including *Florida Power*, which permits citizens to obtain judicial review of agencies' denials of their petitions. *See also, e.g., National Labor Relations Board Union v. Federal Labor Relations Authority*, 834 F.2d 191, 196 (D.C. Cir. 1987); *Montana v. Clark*, 749 F.2d 740, 744 (D.C. Cir. 1984), *cert. denied*, 474 U.S. 919 (1985) (Interior Department regulations); *Natural Resources Defense Council v. Securities and Exchange Commission*, 606 F.2d 1031 (D.C. Cir. 1979); *Natural Resources Defense Council v. Nuclear Regulatory Commission*, 666 F.2d 595 (D.C. Cir. 1981).

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[5]EPA's argument that petitioners were required to file objections prior to obtaining review of their section 348 claim is inconsistent with its own actions in this proceeding. Contrary to its practice with respect matters other than citizens' petitions, *see, e.g.*, 52 Fed. Reg. 1909, 1914 (January 16, 1987), EPA never notified petitioners that it believed objections were required; nor did it publish its denial, which is a prerequisite to the filing of objections. 21 U.S.C. § 348 (f)(l).

The confusion created by the Ninth Circuit's opinion is compounded by the very different, although somewhat unsettled, approach that the D.C. Circuit has taken with respect to review of denials of citizens' petitions under sections 346a and 348. In that circuit, public interest groups have been permitted to challenge the denial of citizens' petitions filed under section 346a(e) in the court of appeals without first filing objections with the agency. *Environmental Defense Fund v. Department of Health, Education and Welfare*, 428 F.2d 1083 (D.C. Cir. 1970). And, like the Ninth Circuit, the D.C. Circuit has held that citizens may challenge regulations issued by EPA under section 346a(e) in the court of appeals without filing objections. *National Coalition Against the Misuse of Pesticides, supra*. But until this Court provides further guidance on interpreting these jurisdictional provisions, the EPA can be expected to argue in other circuits that objections are a prerequisite to seeking appellate review of such regulations.

In addition, as demonstrated by *Public Citizen v. Bowen, supra*, the D.C. Circuit has not decided whether a challenge to the denial of a petition relying on the Food Additives Amendment, 21 U.S.C. § 348, should be filed in the court of appeals or in district court. In that case, a consumer group sought review of the FDA's decision not to ban methylene chloride, a food additive that is regulated under 21 U.S.C. § 348. After the case was filed in district court, the FDA moved to dismiss on the ground that the court of appeals had exclusive jurisdiction, relying on *Florida Power*. The plaintiffs consented to a transfer of the case to the court of appeals, and the court of appeals later dismissed the case on the ground that there was no final order to review (no petition had been filed with the FDA). In the course of its opinion, the court stated that once the agency reached a final decision, jurisdiction "might well be" in the district court. 833 F.2d at 366 n.1. Nevertheless, neither the government, nor

the district court, nor the court of appeals indicated that the plaintiffs were required to file objections prior to seeking judicial review of the denial of their citizens' petition, which is the rule adopted by the Ninth Circuit in this case.

The confusion over where, when, and how to obtain judicial review of EPA's denial of a petition concerning the regulation of a pesticide is not limited to those filed by citizens and public interest organizations. Growers, food distributors, and any other interested parties who petition EPA to amend a pesticide regulation under the Pesticide Amendments or the Food Additives Amendment face the same predicament. These numerous inconsistencies within and among the circuits seriously erode the right to judicial review of petitions regarding the regulation of pesticides, cause unnecessary burdens on the courts, agencies, and interested parties, and justify review by this Court.

3. None of the Justifications Relied on by the Court of Appeals Supports Its Decision.

In *Florida Power,* this Court relied on the significant advantages obtained from consolidating the review of related agency decisions in a single court, preferably the court of appeals. As the Court observed, "[a]t least two implausible results would flow from excluding orders [such as those denying citizens' petitions] from initial review in the court of appeals" — "the resulting duplication of judicial review in the district court and the court of appeals," and the "bifurcation of review orders issued in the same proceeding." 470 U.S. at 742-43. Yet the Ninth Circuit rejected the teaching of *Florida Power* and relied on three other justifications to support its conclusion that it did not have jurisdiction to review petitioners' claims. None of those justifications withstands analysis.

First, the Ninth Circuit concluded that "[i]f parties were free

simply to file petitions, await their denial, and then be assured of jurisdiction in the court of appeals, there would be little incentive to comply with the procedural provisions of the FDC [Act] that require direct appeals from a regulation to be made within the statutory time period." Pet. App. 15. However, if petitioners have a right to judicial review in *some* court, then requiring them to file in the district court under the Administrative Procedure Act does not satisfy this concern. The concern about bypassing the statutory timetable would be satisfied if there were no right to review in any court, but such a decision would be flatly inconsistent with the cases cited *supra* at pages 14-15.

Second, the Ninth Circuit justified its dismissal of the case on the ground there were other "avenues by which [petitioners] *could* ultimately have obtained judicial review," presumably by appealing the agency's regulation lowering the tolerance for Alar in apples from 30 ppm to 20 ppm. Pet. App. 15 (emphasis in original). However, it was totally fortuitous that EPA issued a related regulation shortly after denying the petition, and judicial review of issues raised in citizens' petitions should not depend on such happenstance. In any event, petitioners' right to appeal from even that decision was extremely doubtful in light of the fact that they supported the agency's decision to lower the tolerance for apples, which was the only question on which the agency had requested comments. *See* 49 Fed. Reg. 29,136 (July 18, 1984).

The court also suggested that petitioners could have obtained judicial review under the Food Additives Amendment after EPA had denied their objections. Pet. App. 16. However, petitioners' claim under section 348 was limited to Alar in two types of processed foods, and thus the relief that they could have obtained under that section was much narrower than the relief that their petition had requested under the Pesticide Amendments, 21

U.S.C. § 346a. Therefore, even if it would be proper to require petitioners to file objections to EPA's denial of their request that EPA lower the Alar levels applicable to a few processed foods, that option is not a substitute for judicial review of their section 346a claim, which sought a total ban on all approved uses of Alar.

Third, the court of appeals argued that Congress intended EPA to have the opportunity to consider issues before judicial review is sought. Pet. App. 16-17. However, the petition, which presented petitioners' arguments in great detail, fully satisfied that interest, as demonstrated by the agency's 14-page response, explaining the basis for rejecting the relief that petitioners had requested. Pet. App. 46-65. Moreover, providing for review in the district court rather than in the court of appeals, which is the apparent effect of the Ninth Circuit's opinion, in no way addresses this concern, even if it were legitimate in this case.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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